

WORLDCOM, INC.

1 terminated by "TTI, if you're a representative, it
2 would logically be assumed that you would be
3 procuring customers for Worldcom.

4 Q. And if in the course of that -- if there
5 was an "ATN" calling card that was distributed to
6 customers, is that correct?

7 A. Well, there was the customer calling
8 card, correct.

9 Q. And do you have the Exhibit to find it
10 on?

11 A. Yes, I do.

12 Q. Now, you're ahead of me. I have to get
13 my Exhibits. I'll provide it now, Debtor's A, B,
14 C. Do you have Debtor's Exhibits A in front of
15 you?

16 A. Do I, Mr. Engelman?

17 Q. Yes, do you?

18 A. Yes.

19 Q. Great. Now, could you take a look at
20 Debtor's Exhibit No. A. You testified earlier
21 today that these are examples of calling cards you
22 had. Is that correct?

23 A. That's correct. Customer cards or
24 customer calls that were associated with "ATN",
25 yes.

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1 Q. And so isn't it true that "ATN" and
2 Worldcom were -- or "TTI" would get together and
3 kind of work on jointly this type of card and then
4 send it out to various customers?

5 A. Not the -- on the calling card side, but
6 just in terms of what the situation would be. I'm
7 sure there would be information of what should be
8 on the face of the card and our performance area
9 would have jurisdiction with that and it would be
10 in the marketing department to be sure with the
11 rest of the logos as to what would be on these
12 cards and that would be their decision, yes.

13 Q. Now, on the various "ATN" calling cards,
14 there's also a phone number to which "ATN" can
15 reach or can be reached, I should say, by the
16 customer. Isn't that true?

17 A. Yes. By whoever has a card who could
18 call that number, that's right.

19 Q. And take a look at the Debtor's Exhibit
20 No. B and tell me when you're through and ready.

21 A. I'm ready.

22 Q. Now, in the middle of the paragraph,
23 that was actually deleted the following month,
24 there is a web site that says, "ATN.Com". Is
25 there not?

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1 A. It's listed in the message, yes.

2 Q. And that is not Worldcom's web site is
3 it?

4 A. Absolutely not.

5 Q. Was there a methodology for agents to
6 communicate service calls that it might receive
7 from customers to Worldcom?

8 A. I think there was a couple of ways. I
9 mean, certainly, those could be gotten and
10 representatives could call or they could e-mail or
11 they could -- depending on whether there would be
12 an issue or an issuing service or some sort of
13 change in service. I mean, they could upload
14 information, I think, in some sort of bulletin
15 board of [inaudible] some nature, so, sure, there
16 are two ways of communications, right.

17 Q. Now, a representative agent of Worldcom
18 swimmer to "ATN" would need to have certain access
19 to Worldcom's upload to upload this information?

20 A. I'm not familiar with the exact process,
21 but that would seem logical, so it would be some
22 sort of secure site that nobody could address, but
23 I'm not familiar exactly with the method of
24 uploading it and the uploading of the information.

25 Q. Do you have any knowledge whether "ATN"

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1 uploaded any information that it received from
2 customers that it had procured between July 21,
3 2002 and say December 15, 2002?

4 A. I'm aware that there was limited amount
5 of uploadings that were done. I was told, yes.

6 Q. But you don't personally know that, that
7 was what you were told by somebody else, is that
8 correct?

9 A. Sure, because of the various departments
10 that I would interface with, I mean, I'm not in
11 those departments and I would rely upon my daily
12 contact with people from those departments.

13 Q. Isn't it true that this uploaded
14 information came from "ATN" to Worldcom after
15 August 6, 2002?

16 A. I don't know the exact date ranges so.

17 Q. You just don't know the dates?

18 A. I don't know the dates but if it did, I
19 wouldn't argue with you on it.

20 Q. Do you have or have you reviewed any
21 written communications from Worldcom or electronic
22 communications to Worldcom from Worldcom to "ATN"
23 after August the 6th, 2002 asking "ATN" to not
24 work with any of the customers in terms of follow
25 up services?

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1 A. I don't recall any correspondence
2 directly to "ATN" to do anything after August the
3 6th.

4 Q. Has Worldcom closed off this
5 communication, their electronic communication
6 system between "ATN" and Worldcom that you
7 previously testified to?

8 A. Of which, the bulletin board or --

9 Q. The operating of information?

10 A. I believe it has been taken down. I
11 don't believe there's access to it anymore.

12 Q. Now, was that done around the middle of
13 December, was it around in 2002?

14 A. Yes. I think around probably 12/15,
15 12/16, time frame, that sounds around right.

16 Q. To the best of your knowledge, in fact,
17 didn't Worldcom send whatever information that
18 came from "ATN" regarding [inaudible] up until
19 this time in December that you just testified to?

20 A. I do know it was sent back and
21 authenticated and I guess, there was a limited
22 amount of customer activity. It was like a
23 handful of customer activity. I don't know on a
24 daily basis what may have transpired but from my
25 perspective in the operations area and my

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1 involvement in the contract, when they terminated
2 a contract there was no reason for "ATN" to
3 continue doing any of the obligations they had had
4 under the agreement.

5 Q. But -- let's just withdraw the question.
6 Even after a contract was terminated effective
7 July 28th of -- following up the letter of August
8 6th?

9 A. Mr. Reynolds' letter.

10 Q. Mr. Reynolds' letter, that is?

11 A. Yes.

12 Q. Now, there was still some communication
13 between Mr. Lacho and Mr. Bein regarding renewing
14 their agreement? Was there not?

15 A. I think I saw two e-mails or two e-mail
16 messages that are contained in the Exhibit Book
17 that have a reference to perhaps resurrecting or
18 continuing the relationship, if that would be
19 Exhibit 13 and 14 to the Exhibits.

20 Q. Movant's Exhibits?

21 A. Yes.

22 Q. Now, so from what I understand what
23 you're saying, in your mind August 6th -- this
24 unit was terminated but nevertheless Brent Lacho
25 is continuing to have some communications with

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1 George Bein, regarding, as you described it,
2 resurrecting this agreement. Is that correct?

3 A. Yes, there was some salesmanship going
4 on there.

5 Q. And Mr. Lacho is an employee of
6 Worldcom, is that correct?

7 A. Yes, he is but we're not in the same
8 department or he's not in the same department that
9 I'm in.

10 Q. And he was -- at the time these e-mails
11 were written by him. Is that correct?

12 A. Yes, sir.

13 Q. As I understand for 8.1 of the agreement
14 between my client and your company that was a non-
15 solicitation of customer -- or it was a non-
16 solicitation of customers for [inaudible]?

17 A. Yes, sir.

18 Q. Now, is there anything that -- as you're
19 saying the Court will read it, but in your view,
20 is there anything in Paragraph No. 8.1 that
21 prohibits "ATN" or anyone from "ATN" from
22 soliciting representatives as opposed to
23 customers?

24 A. Other agents or somebody else under a
25 like contract with my company you mean?

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1 Q. Yes.

2 A. No, that is not spelled out in that
3 paragraph.

4 Q. Is it spelled anywhere else in the
5 agreement or any of the amendments that are into
6 evidence?

7 A. No.

8 Q. Now, Paragraph No. 8.1 prohibits, under
9 certain circumstances, the following terms of the
10 agreement. That is "ATN" from soliciting
11 customers; is that correct?

12 A. That's correct.

13 Q. And customers are defined here as "those
14 customers procuring for Worldcom services by
15 "ATN". Is that correct?

16 A. Yes, sir.

17 Q. Now, I want to talk to you about your
18 termination of the agreement between your company
19 and my client.

20 A. Okay.

21 Q. It started off as you described with a
22 letter from Mr. Bein to Worldcom on June 28th. Is
23 that correct?

24 A. The letter was dated June 28th and was
25 received probably a day or two later by me.

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1 Q. And then the termination was ultimately
2 accepted by Mr. Reynolds' letter of August 6th but
3 effective July 28, 2002. Is that correct?

4 A. The August 6th letter was our
5 acknowledgment that we agreed to accept the
6 termination of the 30 day period having expired on
7 the 28th.

8 Q. And you testified earlier in part, that
9 acceptance of that termination was due to an
10 understanding that "ATN" was in violation of the
11 phone solicitation provision of 8.1. Is that
12 correct?

13 A. That's correct.

14 Q. Now, you do not have a written document
15 that would substantiate that non-solicitation by
16 my client as alleged. Do you?

17 A. A written document from who?

18 Q. From -- I have an e-mail from Mr. Lacho
19 that was sent to me and to our legal department
20 stating a conversation that he had on July the
21 31st with your client and an acknowledgment by
22 your client that, yes, they had or were looking to
23 procure customers, in effect, violating 8.1?

24 A. Yes.

25 Q. Did Mr. Lacho show you any letters

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1 written by "ATN" or its representative directed
2 towards customers to solicit their business from
3 Worldcom?

4 A. The September 25th letter is the letter
5 that I got from Mr. Lacho which showed those
6 solicitations, yes.

7 Q. But that wasn't the letter that you made
8 your -- based your decision upon to accept the
9 termination, was it?

10 A. No. But the answer to your question had
11 he provided -- but in that time frame of the
12 August the 6th letter, no.

13 Q. Now, understood. But going back to the
14 decision to accept the termination, you testified,
15 I believe, earlier today and in answer to Ms.
16 King's questions that sometime around the end of
17 July you were told, I think, by Mr. Lacho, that
18 "ATN" was soliciting customers. Is that correct?

19 A. Yes. I think it was like actually the
20 first or second of August that I had that
21 conversation with Mr. Lacho.

22 Q. Fair enough. Now, my question is now,
23 did Mr. Lacho show you at that time any letters or
24 e-mails or any written communication from "ATN" to
25 any customer in which it solicited that sort of

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1 business?

2 A. Not at that time, no.

3 Q. Has Mr. Lacho or anybody else ever
4 showed you any written communication or electronic
5 communication which substantiates the position
6 that there was solicitations by my client other
7 than the September 25th letter?

8 A. Well, just so I want to be clear with
9 you. On the time -- the September 25th and
10 subsequent to September the 25th, there was a lot
11 of correspondence and prior to September 25th
12 there was a -- let's call it July 31st phone call
13 to my estimation between your client and Mr.
14 Lacho.

15 Q. All right. Let me ask if I can ask it
16 in this fashion. Have you ever seen any written
17 documentation or electronic documentation to
18 substantiate the July 31st phone call that "ATN"
19 was soliciting customers?

20 A. No, sir.

21 Q. Now, take a look, please, at Movant's
22 Exhibit 10, which is Mr. Reynolds' August 6th
23 letter.

24 A. I have it.

25 Q. And you've reviewed that, I gather,

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1 pretty carefully before today's hearing?

2 A. Yes. Very much so, including I'm the
3 guy that put it together.

4 Q. Now, did you review it before it went
5 out by Mr. Reynolds?

6 A. Yes, he would have forwarded it to me,
7 that's correct.

8 Q. Now, is there any mention in this letter
9 about a specific solicitation by "ATN"?

10 A. No.

11 Q. Okay. Now, this letter says that the
12 contract we accept the termination and it points
13 out the requirements of Paragraph No. 8.1, that
14 survived the termination of the contract. Is that
15 correct?

16 A. Yes, it does.

17 Q. Now, let's talk for a second about the
18 September 25th letter of my client, which is our
19 Exhibit or Movant's Exhibit No. 15.

20 A. I have it.

21 Q. But before I do that, let me show you
22 that and also look at Exhibit 16 and 17, please.

23 A. I have those as well.

24 Q. Exhibit 16 and 17, I believe, came to
25 your attention, I believe you testified, in the

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1 early part of December, perhaps the first week of
2 December of 2002. Is that correct?

3 A. December 4th, to be exact.

4 Q. Now, and other than the Exhibits 16 and
5 17, is it true that the only written document you
6 have ever seen which purports to be a solicitation
7 by "ATN" of customers as that term is defined in
8 the agreement that we had marked, is the September
9 25, 2002 letter?

10 A. That is all that was brought to me, yes.

11 Q. You don't have any personal knowledge of
12 any others, do you?

13 A. Not that I'm aware of.

14 Q. And the September 25, 2002 letter that
15 we've marked as Exhibit 15, Movant's Exhibit No.
16 15, did not trigger a lot of activity in your call
17 center such as you've described in response to
18 Exhibit 16 of 17. Is that correct?

19 A. I did not go back and locate any kind of
20 call fluctuations in that period of time. I was
21 more concerned with the breach than the call
22 volume.

23 Q. Now, Mr. Ahern, please take a look at
24 Debtor's Exhibit E, which is the schedule of
25 revenues and commissions. I think we can do this

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1 by memory. I just want to clarify, the last post-
2 petition commission check paid by the Debtor to
3 "ATN" was covering the period for September of
4 2002. Is that correct?

5 A. That's for the services provided during
6 that month?

7 Q. That's right. That was for the invoices
8 for that September of 2002.

9 A. That's correct.

10 Q. And nothing was paid for November or for
11 October, November and December or beyond that, is
12 that correct?

13 A. That's correct.

14 Q. After the August 6th letter, excepting
15 the fact that the termination was September to my
16 client by Mr. Reynolds, there were more commission
17 checks issued by Worldcom to "ATN"? Is that
18 correct?

19 A. That's correct.

20 Q. So, in spite of the violation that you
21 heard about, the decision was to continue to make
22 the payments, correct?

23 A. Yes, after a lot of deliberation what we
24 decided would evolve to the course of action to
25 take rather than accept the termination under 8.1

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1 or 8.3, that the acceptance of the "ATN" request
2 to terminate would be accepted and the reminder of
3 the obligations under 8.1 were pointed out.

4 Q. And the reminder of 8.1 was?

5 A. Don't take our customers.

6 Q. Don't take the customer?

7 A. Yes.

8 Q. And these customers, which is, by the
9 way, did they sign written contracts with Worldcom
10 or for services, that is?

11 A. I don't think all the customers are that
12 type. I think they are more like month to month
13 type agreements. A short term relationship, yes.

14 Q. So, then now they pay their bills, these
15 customers and they could go to print service or
16 service down the road and their service would be
17 there?

18 A. They could come, yes.

19 Q. Now, so it's important that for
20 [inaudible] to keep this customer base that they
21 be provided service, I assume, is that right?

22 A. It's important that they be provided
23 network service and customer service.

24 Q. And this customer base and the income
25 that came from this customer or these customers

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1 procured by "ATN", as well as customers procured
2 by any representative agent is an important part
3 of Worldcom's business, I would assume. Is that
4 correct?

5 A. I would like to think that, sure. Any
6 generated customer is appreciated. Any customers
7 that use our services, yes, or sales
8 representative is important, yes.

9 Q. And isn't that one of the reasons that
10 Mr. Reynolds stated in his August 6th letter
11 accepting the termination that "ATN" should keep
12 its hands off these customers because they are
13 important to us?

14 A. Yes.

15 Q. And Mr. Marcus wrote letters or a couple
16 of letters to "ATN", one of them being Exhibit 18,
17 or Movant's Exhibit 18. These are all dated
18 December 23, 2002, correct?

19 A. That's correct.

20 Q. And had Worldcom made a payment of
21 commissions to "ATN" during the month of December?

22 A. No, we did not.

23 Q. And the payment that would have been due
24 if one were to be paid in December, that would be
25 back to October services? Is that correct?

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1 A. That would be for the month of October
2 paid in December, correct, right.

3 Q. And that the commission would have been
4 paid around December the 15th if it were going to
5 be paid at all, is that correct?

6 A. That's right.

7 Q. And this letter came after the 5th of
8 December and after your company decided not to pay
9 any more commissions to "ATN", is that correct?

10 A. That's right. This letter was in
11 response to the mass mailing that I became aware
12 of on 12/4 and contacted Mr. Marcus and he
13 authored this letter.

14 Q. And the point of this letter is "stop
15 soliciting our customers". Is that correct?

16 A. I can't speak for Counsel but I think
17 on the basis of the two points, one is, don't take
18 the customers and another was part of -- this was
19 the automatic stay that was in place as a result
20 of the bankruptcy.

21 Q. And I will have you turn to Exhibit 19,
22 which is Mr. Marcus's February 3rd letter. Have
23 you read this letter as well?

24 A. Yes, sir.

25 Q. And this is another letter from Mr.

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1 Marcus to my client not to solicit the other
2 representative's agents, is that correct?

3 A. Yes, it is. But understanding that the
4 total of the message of this letter and of the
5 e-mail generally, from their client was
6 encouraging those representatives to move
7 customers away from Worldcom, going at it at a
8 different direction and having an effect.

9 Q. And again, I think we talked about
10 earlier that there was no prohibition
11 contractually of my client about contacting
12 agents, is that correct?

13 A. There is nothing specific in the
14 contract about going after agents, only the
15 customers of those agents.

16 MR. ENGELMAN: May I have a brief
17 second, Your Honor, please?

18 THE COURT: Go ahead.

19 MR. ENGELMAN: That's all the
20 questions that I have, thank you.

21 THE COURT: Any redirect
22 examination?

23 MS. KING: Yes, Your Honor.

24 THE COURT: You can go ahead, Ms.
25 King.

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1 REDIRECT EXAMINATION

2 BY MS. KING:

3 Q. Good afternoon, Mr. Ahern.

4 A. Good afternoon, Ms. King.

5 Q. With relation to the August 6th letter
6 sent out by Mr. Reynolds, was there a
7 consideration of sending a more specific letter
8 related to the specific solicitations that
9 Worldcom had learned about?

10 A. Yes, there was.

11 Q. And were there, in fact, drafts of such
12 letters?

13 A. There were drafts circulated by our
14 Legal Department for my review and the review of
15 my Vice President. I also believe certain other
16 people in the Legal Department as well and those
17 drafts were read by those people and we were, I
18 believe, in agreement with the strong language
19 that was in them.

20 Q. And the strong language would have been
21 specifically related to the solicitation
22 activities in early August that you testified to?

23 A. In that late July sort of thing where I
24 was made aware of it in early August, that's
25 correct.

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1 Q. And the Movant 14 letter that Mr.
2 Reynolds sent out after the September 25th
3 solicitation that you testified to, do you know if
4 that specifically referenced the September 25th
5 solicitation by "ATN"?

6 A. It had an attachment to the letter from
7 "ATN" to that customer and a second attachment was
8 the August the 6th letter.

9 Q. But the letter itself did not
10 specifically mention September the 25th in it?

11 A. No, I don't believe so. I can look
12 again but I don't believe it did, no.

13 [end of Tape 2, Side B]

14 REDIRECT EXAMINATION

15 BY MS. KING:

16 Q. With regard to the customer service
17 activities which "ATN" might have undertaken post-
18 petition, in any way would Worldcom have used
19 those activities as a benefit to its post-
20 petition?

21 A. No.

22 Q. Why not?

23 A. I mean, again, we have a well trained,
24 well staffed customer service center in San
25 Antonio to handle these calls and the fact is that

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1 after our -- after the July 28th termination of
2 the agreement, there was no benefit being brought
3 to MCI and there were no new customers brought on
4 for utilizing the network and who came to us
5 through "ATN" at our customer service center
6 number and there were a variety of ways they could
7 get there. So, you know, at the end of the day if
8 "ATN" basically upon their own decision wanted to
9 cease doing anything, you know, they could have
10 disconnected the number or have that number say,
11 "TTI", please be sure to dial 800". So there's no
12 benefit.

13 Q. And if, in fact, was there a concern
14 that given the solicitation effort by "ATN", that
15 customers contacting that customer service number
16 would have potentially been asked to switch away
17 from Worldcom?

18 A. That's right. I think it's safe to say
19 we viewed it more as a possible lead source for
20 them, for any new customer calling in who would
21 have been asked to move to another provider that
22 "ATN" was now associated with.

23 Q. Do you have knowledge of any impact that
24 the solicitation by "ATN" in late July and in
25 September and in the November and December time

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1 frame and subsequent to that on your customer
2 base?

3 A. Well, I think that I would -- well, I
4 can answer it this way or in a couple of ways.
5 Yes, there was a decline somewhat in the base but
6 I think a bigger concern to us, quite honestly,
7 was those customers calling in who were receiving
8 solicitations who would then say, "hey, what is
9 going on? Do I have to move or don't I have to
10 move"? And quite often, the result was that we
11 got these customers to remain with us by -- at
12 lower rates than by cutting down on the business.

13 Q. After the post-petition -- after July
14 the 21st, was it important for you to continue at
15 the customer service center to answer questions
16 that were generated to the customer service center
17 and provide quality customer service to that
18 customer calling in?

19 A. As important post as pre and just maybe
20 a little bit more, given all that was going on
21 with the company and we had to hold on to every
22 customer that we had.

23 Q. And would you have associated in any way
24 any activities undertaken by the service that was
25 provided by "ATN", post-petition, with maintaining

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1 the generation of revenue from these customers
2 that were Worldcom customers?

3 A. I'm sorry, would you just rephrase that,
4 please?

5 Q. In relation to the post-petition alleged
6 services that "ATN" provided, would you have, in
7 any way, viewed those services as a basis to the
8 continued generation of revenue from your
9 customers?

10 A. No, there was nothing there -- or there
11 was nothing being done by "ATN" that we could not
12 have done ourselves on a greater -- not even on a
13 greater scale.

14 Q. Now, with relation to a decline in the
15 customer base that may have occurred post-petition
16 related to the solicitation activity of "ATN",
17 would the decline essentially be a normal decline
18 in customers?

19 A. I mean, there is, you know, the ebb and
20 flow of customer base in the company, I mean,
21 there are customers, for whatever reason, who
22 believe -- it's whether, you know, what they view
23 as less costing services or some other reason
24 would have left. So, there's always going to be
25 attrition of customers as well as the

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1 replenishment or replenishing of that customer
2 base to maintain the revenue by offering services
3 to different customers.

4 Q. But in terms of the numbers that you
5 might have attributed to attrition, were they
6 beyond the norm of what you would expect in
7 attrition?

8 A. No, I don't think there's any indication
9 to go with that, no.

10 MS. KING: I have no further
11 questions. Thank you.

12 THE COURT: Any further recross
13 examination, Mr. Engelman?

14 MR. ENGELMAN: No, Your Honor.

15 THE COURT: Any more witnesses to
16 put on with regard to the Debtor?

17 MS. KING: No, nothing further
18 from the Debtor with regard to
19 witnesses.

20 THE COURT: If the Movant has no
21 other witnesses, I will take a short
22 break to let you gather your thoughts
23 and I will entertain closing statements
24 from both sides. Thank you very much.

25 [recess]

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1 THE COURT: You may proceed, Mr.
2 Engelman.

3 MR. ENGELMAN: Your Honor, we're
4 here asking the Court to award "ATN" in
5 their administrative claim and we think
6 it's provided for under a 503B action.
7 This is not a case just where we earned
8 a commission pre-petition, pursuant to
9 pre-petition contract. There is more to
10 it than that, Your Honor, otherwise we
11 wouldn't just be here if that were just
12 the issue of the typical salesman
13 entering into a contract with a Debtor
14 pre-petition and than post-petition.
15 Money comes due, that is not what this
16 is all about.

17 We think there are two things that
18 "ATN" has done that has provided
19 substantial benefits to the estate.
20 First and foremost, that until November
21 the 15th and thereafter -- until a month
22 thereafter, and then continuous from
23 December 15th, "ATN"/"HSG", did not
24 solicit customers in spite of what you
25 might have heard today. We just did not

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1 solicit customers. This was a critical
2 important piece to the Debtor's estate,
3 as I will discuss shortly with regard to
4 interfering, I mean. This effort was
5 not solicitation but solicitation was
6 induced by the Debtor. The second point
7 that we think is important to the estate
8 was the follow up services that were
9 provided by "ATN" to the customer. Your
10 Honor, the cases of Amalgamated
11 Insurance of good law, I'm not
12 suggesting that is not good law, Your
13 Honor.

14 I've read the decision rendered in
15 the Enron case with respect to
16 administrative expense and I won't sit
17 here and discuss the various elements of
18 it for the awarding of the
19 administrative expense claims because
20 you know it but there are two things
21 that have happened post-petition, as
22 I've just described. What you really
23 have here is a Debtor who wanted my
24 client not to solicit but didn't want to
25 pay it. He paid it for a little while

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1 and then decided, along with others in
2 this case, along with other
3 representative agents when they filed
4 the motion to reject in December of last
5 year, that they didn't want to pay those
6 commissions either, for what we call
7 residual commissions. Your Honor, the
8 two elements that we have to prove and
9 we realize this is our burden is one,
10 that there was some inducement by the
11 Debtor in possession and then number
12 two, that we provided to the benefit of
13 the estate.

14 Now, let's talk about the
15 inducement first. We submit that it's
16 -- the inducement which exists in spite
17 of what Mr. Ahern has stated today and I
18 think the credible evidence and the
19 logic says that there was inducement and
20 how -- let's go back, first of all, to
21 what this contract says. The operative
22 provision, Your Honor, Paragraph No. 8.1
23 of the representation agreement which is
24 Movant's Exhibit No. 1, this says that,
25 "Worldcom will pay commissions in

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1 accordance with this Exhibit and also
2 with Exhibit B, will continue to pay
3 this residual or these residual
4 commissions based upon services realized
5 by customers, procured by "ATN" and in
6 exchange for that, in mutuality, that is
7 to say for that, that my client will not
8 solicit customers.

9 Now, this is the one provision of
10 this commission agreement that survives
11 the termination, whether you want to
12 call it termination by the parties or
13 rejection. The Court may be aware that
14 in this particular contract, which was
15 part of the rejection notion that was
16 filed in December. The motion was filed
17 in December despite the termination and
18 this particular provision survives and
19 this provision has mutuality to the
20 commissions for non-solicitation
21 commissions. Now, they go hand in hand
22 so when Mr. Reynolds writes this letter
23 of August the 6th in which I pointed out
24 it in cross examination, that actually
25 no reference to this purported

WORLDCOM, INC.

1 solicitation by "HSG" in July.

2 They don't have any written
3 evidence of that and Mr. Bein had denied
4 that ever occurred but we have Mr.
5 Reynolds, when he wrote this letter he
6 says, Section 8.1 survives termination
7 of the agreement for so long as "MCI"
8 has an obligation to pay "ATN" any post-
9 petition termination commissions. I
10 don't know what else could be done
11 stronger than that statement, Your
12 Honor, to create the element of
13 inducement.

14 I think that says it in black and
15 white. This is not the pre-petition
16 company saying that, this is the Debtor
17 or the Debtor in possession that it is
18 not this provision of this contract that
19 has survived the termination and we will
20 pay you and you need to honor this
21 provision. That is what the contract
22 says and my client did that. Now, we'll
23 get to the September 24th letter which
24 Mr. Bein testified was isolated
25 circumstances and I would refer to the

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1 same thing on the other side, where they
2 make try to make hay of it, but there is
3 no evidence that this was anything other
4 than an isolated circumstance, Your
5 Honor, and I would submit there is no
6 written evidence, no electronic evidence
7 to indicate that this was anything other
8 than what Mr. Bein testified to and with
9 somebody that had a long standing
10 relationship. So we have the inducement
11 by this letter and we also have
12 inducement by the letters that are
13 Exhibit 11, 12, those Worldcom letters
14 of August 2nd to its agents that Mr.
15 Bein testified they received in the mail
16 as well as the August -- Exhibit 13 or
17 Exhibit 12, which was the other notice
18 letter to all of the agents that Mr.
19 Bein testified to, that he also receive
20 along with the other evidence of
21 inducement, to conform to and to perform
22 the remaining terms of this contract.

23 Now, what other evidence of
24 inducement is there? Parties are
25 continuing to talk about the seventh

WORLDCOM, INC.

1 amendment, right up at least through
2 August or a portion of August after the
3 case had been filed and more inducement.
4 These maintenance services that my
5 client testified were provided and I
6 asked Mr. Ahern specifically, Your
7 Honor, so you understand that
8 information procured by my clients and
9 that is post-petition calls from
10 customers we're directed to Worldcom,
11 and they were directed both orally by
12 phone and they were directed
13 electronically and this information was
14 received and nobody said to my client,
15 "we're not paying, so stop doing this".

16 You know, they received the benefit
17 so I think that is another example, Your
18 Honor, for establishing the inducement
19 element. If not, what benefit was
20 conferred and what is this all about.
21 They want to continue to maintain this
22 customer base, Your Honor and these are
23 not long term customers in terms of a
24 contract and they are not signing for
25 six months and they're not signing on

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1 for the year. They are -- they come and
2 go each month and so it's particularly
3 important to try not to have these
4 customers solicited and also to provide
5 the best service that you can, because
6 it's a volatile market.

7 So, what "ATN" did was, it fielded
8 these ten thousand calls that came into
9 its call center and that is evidence
10 that is undisputed. Now, whether this
11 is a variable call center at Worldcom,
12 begs the question. The issue is these
13 calls were made and they were serviced
14 by information which was provided and
15 sent over to Worldcom but the benefit
16 was to preserve this customer base and
17 if you take a look at the Exhibits, you
18 will see the letter, and I think you
19 will find that that, the written numbers
20 bear that out, because it's a fairly
21 consistent renewal of numbers until
22 "HSG" to solicit customers that really
23 started in November, that had the effect
24 of starting in December and more
25 probably in January. So, what I'm

WORLDCOM, INC.

1 talking about, Your Honor, is a
2 situation where my client at the
3 specific request of this Debtor honored
4 its agreements that survived the
5 termination and did not solicit until
6 the middle of November and did so at
7 that time because it had information
8 that it would not receive any more
9 payments which, in fact, came to bear,
10 along with all the other many
11 representation agents.

12 Now, how do we quantify this? You
13 know, Your Honor, this is not easy, I
14 mean, it's too easy to quantify the
15 negative but we could, in evidence of
16 the effect of the one month solicitation
17 and how many customers it took from the
18 Debtor, so, I mean, in that, in and of
19 itself, that indicates the value of the
20 non-solicitation. So, there is a very
21 direct benefit to the estate by not
22 soliciting. So, how much money are we
23 looking for, Your Honor? One of the
24 Exhibits that we put forth looks at what
25 the revenue is and it has to do with

WORLDCOM, INC.

1 what the commissions that were paid and
2 then the commissions that were unpaid
3 post-petition. We think we're entitled
4 to all of the commissions that are due
5 post-petition, but because we believe
6 that it was in a Debtor's failure to
7 make payments as they came due, which
8 gave rise to my client having to solicit
9 because what the Debtor was looking to
10 do was to have my client not solicit
11 customers, but they would not pay them
12 any post-petition commissions.

13 They wanted their cake and they
14 wanted to eat it, too. Now, so I don't
15 believe we were entitled to commissions
16 forever, based upon the commission
17 arrangement. However, I think, what is
18 appropriate in this case is to award my
19 client the commissions that were due for
20 the month of October and the month of
21 November and the month of December. And
22 I think that approximates around
23 \$600,000. The precise numbers are in
24 the record, at about \$600,000 and that
25 is because now it's -- those months that

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1 my client did not solicit were the
2 monies -- let me back up. The
3 solicitations started actually in
4 November, but because the benefit and
5 because the effect of that didn't take
6 place until probably closer to January,
7 we believe that we're entitled to three
8 months commissions.

9 Now, that is where we provided
10 the benefit by not soliciting. However,
11 if I can just go back for a minute,
12 we're certainly entitled, Your Honor, to
13 the month of October, because there was
14 no solicitation at all during that month
15 and we're entitled to at least half of
16 November, because there was no
17 solicitation prior to November. We're
18 entitled to this money, Your Honor,
19 because we preserved the customer base
20 by not soliciting and by also providing
21 these maintenance services when the
22 customers called in. So, for this
23 reasons, we would urge the Court to
24 grant our motions for administrative
25 leave and interest at the Movant's

WORLDCOM, INC.

1 request.

2 THE COURT: Okay. Thank you very
3 much. Ms. King?

4 MR. MARCUS: Mr. Marcus,
5 Christopher Marcus from Weil, Gotshal,
6 on behalf of Worldcom. Excuse me, Your
7 Honor, in its administrative cross
8 motion, "HSG" argued that
9 notwithstanding the fact that they
10 terminated the representation agreement
11 and had admitted to soliciting the
12 Debtor's customers in violation of that
13 agreement, that they're entitled to
14 continuing payments for commissions
15 based upon -- or entirely upon orders
16 pre-petition.

17 This assertion is in direct
18 contradiction of the case law surrounded
19 by the Bankruptcy Code and certainly,
20 it's in direct contradiction of the
21 policy behind the Bankruptcy Code. Both
22 parties here agree on the case law,
23 "Mamouth, Jartran, Amalgamated, Enron",
24 in order to demonstrate the entitlement
25 to administrative claim under Section

WORLDCOM, INC.

1 503. And, of course, the burden is on
2 the Movant to demonstrate first that the
3 claim arises out of transaction between
4 the Claimant and the Debtor in
5 possession, and that the services
6 provided by the Claimant were actual
7 necessary benefits to the estate.

8 Now, again, in "Denton and
9 Anderson Company" vs. "Induction Heating
10 Corporation" and in "Dynach-Cuits" and
11 in "Fagels Corporation" all of which are
12 cited in the Debtor's objection to this
13 motion. The facts are perfectly
14 identical to the instant fax, and in
15 each case a sales representative went
16 out and procured orders for the Debtor
17 in pre-petition or a pre-petition period
18 and the goods or services were provided
19 post-petition and the Debtor was paid
20 for the goods and services, post-
21 petition and at every case the Court
22 disagreed with the Movant's argument.

23 They relied on the same language in
24 Anderson and I'm quoting from 178F.2nd,
25 841, 844. I see nothing in the

WORLD.COM, INC.

1 Appellant's contention that the
2 Appellant should have a preferred claim
3 because the Debtor's estate was in
4 riscuity [ph] from the debt to having
5 filled the order, paid the estate and
6 which was no more enriched then it would
7 have been if the Debtor both on the
8 filling of the arrangement in regard to
9 the goods, and sold them afterwards and
10 no one argued that the unpaid seller of
11 such goods would be entitled to more
12 than a general claim.

13 The case law here is more than
14 clear. "HSG" attempts to circumvent
15 "Denton & Anderson" and cases that
16 follow by asserting that they did not,
17 with the pre-petition orders that were
18 procured but rather than call center
19 services and this fictitious compliance
20 with the nonsense that it entitles them
21 to an administrative claim, which
22 happens to be the amount of the
23 commissions. Now, in examining each of
24 their asserted benefits to the estate,
25 it's clear that neither one entitles

WORLD.COM, INC.

1 them to an "admin" under Section 503.

2 First with respect to the call
3 center services, which "HSG" has devoted
4 and the services which were provided
5 pursuant to the transaction with or were
6 induced by the Debtor in possession and
7 that the services were actual and
8 necessary benefits to the estate. Now,
9 before I go any further, I think it's
10 important to note that there is nothing
11 in the contract that contemplates any
12 call center services. No part of
13 "HSG"'s commission is based upon call
14 center services. Section 11 of the
15 representation agreement provides that
16 and I'm quoting, that "Worldcom is
17 interested only in orders for services
18 that represented only in orders for
19 services by representative obtained".
20 Now, the definition of "services" were
21 on the agreement, is the "services" that
22 Worldcom provides for the customers.

23 Now, call center is something that
24 Worldcom allowed "HSG" to do prior to
25 "HSG"'s termination of the agreement but

WORLDCOM, INC.

1 to serve "HSG"'s interest, the call
2 center was not for Worldcom's benefit.
3 The call center was for "HSG"'s benefit.
4 If there are any customer service issues
5 that came in, they were all handled by
6 Worldcom customer service center, all
7 bills, invoices, calling cards, welcome
8 letters, they all directed customers to
9 Worldcom customer service center for
10 more service.

11 "HSG" is arguing they should be
12 paid for something that they weren't
13 even entitled to be paid for under the
14 contract. Nevertheless, with respect to
15 inducement or the inducement problem
16 that "HSG" has raised, either in papers
17 or at the hearing to have induced or to
18 provide call services, in more ways, let
19 me just say first, these e-mails, which
20 in between Lacho and Bein, which are
21 Exhibit 1 and 14 and "HSG"'s Exhibit
22 both, and second it's the August 2nd
23 memorandum and the August 5th letter --
24 I mean, these are Exhibits 11 and 12 and
25 third it's the welcome to include

WORLDCOM, INC.

1 messages in the Debtor's invoices from
2 "HSG" and that is Debtor's Exhibit B and
3 C. And fourth, that customers retain to
4 be able to call with "HSG" phone number
5 on it as Debtor's Exhibit No. A.

6 Now, Your Honor, it's clear that
7 each one of these did not induce any
8 post-petition services by "HSG". Let's
9 first look at the Bein, Lacho mails or
10 e-mails, between Lacho and Bein that
11 demonstrate nothing more than Worldcom
12 and "HSG" who were discussing the same
13 thing, that is "HSG"'s desire to remove
14 the exclusivity provision from the
15 agreement, no requests to provide
16 services or any commitment whatsoever
17 from Worldcom. It defies logic that the
18 e-mail from Brent Lacho, that Worldcom
19 may or may not agree to the amendment.
20 The pre-petition contract which could be
21 read as inducement for "HSG" to provide
22 call center services that are not even
23 contemplated under the contract and that
24 "HSG" is not entitled to payment for the
25 August 2nd memorandum, August 5th letter,

WORLD.COM, INC.

1 Your Honor. And these were taken from
2 the web site that the Debtor's maintain
3 for their agents. That "HSG" had access
4 to after it terminated its contract and
5 no longer wanted to be an agent. And
6 while "HSG" had received the August 5th
7 letter in the mail but on August 6th the
8 Debtor had not yet accepted "HSG"'s
9 termination and it's logic that any
10 generic mailing that went out -- that
11 "HSG" would be included in that mailing.

12 However, when I asked Mr. Bein if
13 he knew what the web site was maintained
14 for, his answer was, for agents. Now,
15 it's just more than a business duplicity
16 to have said on one hand it had
17 terminated the contract and no longer
18 wanted to be an agent but on the other
19 hand, to have access to the web site and
20 read letters that were designed
21 specifically for agents, and argue these
22 were induced by those letters. Even
23 more important, though, you know, is
24 that these letters did nothing more than
25 manifest an intent to pay for the

WORLDCOM, INC.

1 Bankruptcy Code and a very similar
2 argument was made by the "HSG" Dyna
3 Circuits, were the agents in Dyna
4 Circuits argued that the Debtor had
5 waived its right to claim that the sales
6 representative was not entitled to
7 administrative claim because the Debtor
8 sent him a letter stating in identical
9 fashion as the Debtor's letter, that
10 Dyna Circuits attorneys have advised
11 Dyna Circuit that the Bankruptcy Code
12 prohibited payment to the extent that
13 the commissions were earned for the
14 post-petition. And that the Debtor would
15 pay those commissions.

16 [end of Tape 3, Side A]

17 MR. MARCUS: The Court disagreed
18 with the sales representatives argument
19 for several reasons. One which was and
20 this is at 1.3, 74, the language of the
21 January 5th letter reflects no more than
22 an intent to enforce the provision of
23 the Bankruptcy Code as interpreted by
24 the Debtor's Counsel and they're doing
25 exactly what Worldcom did here. Now,

WORLDCOM, INC.

1 the third assertive inducement is the
2 typed messages in the invoices, the
3 customer service numbers on the invoices
4 and it had always been Worldcom's
5 customer service number and I don't
6 think you have to see that the message
7 had nothing whatsoever to do with
8 customers where the call center -- in
9 effect, that the message was removed at
10 the time of the invoices and immediately
11 after Worldcom accepted "HSG"'s
12 termination of the contract.

13 This argument was all but abandoned
14 by "HSG" at the hearing. Your Honor,
15 Mr. Ahern testified that the only
16 language in the invoices pre-petition
17 was basically free advertisement for
18 "HSG" and "HSG" selected new sub-agents
19 and never had anything to do with
20 directing customers to call "HSG" for
21 customer service issues. And more
22 importantly, though, the Debtor's
23 removed the "HSG"/"ATN" message as soon
24 as possible. The very first invoice
25 that went out after commencement date

WORLDCOM, INC.

1 and finally, the calling card, the
2 fourth type of inducement, similar to
3 the invoices, to the welcome letters.
4 The calling card did not direct
5 customers to "HSG" but for customer
6 service issues, there's customer service
7 number which is Worldcom's number and
8 all the calling cards state the same
9 thing, that if you want additional
10 calling cards or other services, call
11 "HSG" but for customer service issues,
12 call Worldcom customer service number.

13 I think that it's clear that each
14 of these four types of inducement, claim
15 to be by "HSG", in fact, is nonexistent
16 with respect to the actual and necessary
17 beneficial portion. The call that the
18 "HSG" log has introduced to me into
19 evidence is completely the relevant log.
20 Mr. Bein estimated that 90 percent of
21 the calls were from customers and "HSG"
22 has the burden of showing, in any
23 services that they provided, which the
24 Debtor would dispute, that they provided
25 any services, but that any services

WORLDCOM, INC.

1 provided, that they were actual and
2 "HSG" may potentially have provided some
3 advice for some service through customer
4 and that is insufficient to establish an
5 entitlement to an administrative claim.
6 Mr. Bein testified that he could not
7 determine what services were provided
8 and he could not determine whether the
9 calls were received from the Debtor's
10 customer as opposed to some other third
11 party. In fact, Mr. Bein agreed that
12 somebody who went on the web site and
13 got the telephone number could have
14 called that number to purchase a cell
15 phone or obtain a telephone and I don't
16 think anybody would argue that.

17 But as to the benefit to Worldcom
18 in this case -- I mean, it doesn't
19 demonstrate "HSG" actually provided
20 anything to the customer. In addition,
21 Your Honor, and I think most
22 importantly, I heard Mr. Ahern testify
23 at great length that the Debtor's
24 maintain their own call center. And I
25 feel 47 to 48,000 calls a month from

WORLDCOM, INC.

1 hundreds of thousands of customers and
2 the call center operates 24 hours a day,
3 365 days a year. It's uncontroverted
4 that any call services that "HSG"
5 provided were not necessary as Worldcom
6 had expected to continue to provide the
7 customer service through its own call
8 center.

9 In fact, it's illogical to assert
10 that the Debtor's would want "HSG" to
11 continue accepting calls when they
12 maintain their own call center and were
13 a fact away, that "HSG" was soliciting
14 their customers as Mr. Ahern testified.
15 This was another method for "HSG" to be
16 able to contact the customers which
17 Worldcom had wanted to have. Your
18 Honor, I think it's clear that "HSG"
19 does not show any inducement with
20 respect to the call center services that
21 the call center services were actual and
22 they weren't anywhere necessary or that
23 there was benefit from these call center
24 services.

25 With respect to the non-

WORLD.COM, INC.

1 solicitation covenant, "HSG" also has
2 the burden of demonstrating that this
3 restrictive covenant was entered into by
4 "HSG" and the Debtor's in possession and
5 that not soliciting the Debtor's was
6 actual, necessary and provided a benefit
7 to the Debtor's estate. Now, the non-
8 solicitation provision, first and
9 foremost, is not a transaction through
10 "HSG" and the Debtor in possession.
11 Because right out of the gate, Section
12 1.6 of the sixth amendment which is
13 entered into by Worldcom. That is about
14 nine months before the filing of "HSG"'s
15 motion on page six. And I referenced
16 just above the conclusion where "HSG"
17 actually states, it said, "this prong
18 because the restrictive covenant was
19 entered into between "HSG" and
20 Worldcom".

21 Worldcom and that doesn't say the
22 "prong". In fact, that is a patent
23 admission and this is a pre-petition
24 contract -- a pre-petition agreement
25 between Worldcom and the pre-petition

WORLDCOM, INC.

1 Debtor and "HSG" is compliant with the
2 restrictive covenant which was actually
3 necessary for -- provided for any
4 benefit to the estate. And again, "HSG"
5 has argued that they have provided the
6 Debtor with the services of not
7 soliciting the Debtor's customers. That
8 was because 503 offers an administrative
9 complain to induce the parties to
10 transact business and to provide goods
11 and services to Debtor in possession.

12 So, "HSG" is arguing about not
13 soliciting and saying they are providing
14 a service to the Debtor. Your Honor,
15 compliance with the restrictive covenant
16 is not a service. Courts have examined
17 where compliance is a non-competition
18 service and most of -- what is the
19 contention of 541, 96, provides earnings
20 from services performed by an individual
21 Debtor after the commencement of the
22 case which are not property of the
23 estate, essentially where Trustee
24 administering the estate that view the
25 Debtor and so the estate would not

WORLDCOM, INC.

1 gobble up that individual Debtor's
2 earnings.

3 Similar to the administrative
4 claim, but with regard to the individual
5 Debtor, in re: "Schneweiss 233BR28",
6 Bankruptcy Court of the Northern
7 District of New York, which held that
8 the phrases, "services performed" does
9 not include services not performed and
10 including from the 9th Circuit
11 Bankruptcy Appellate Panel and it states
12 at page 30 that, "despite the fact that
13 Debtor may not be [inaudible] to comply
14 with the phrase, not to compete, and
15 Counsel contents compliance must be
16 personal services, because it can be
17 performed only by him".

18 This argument sounds convincing
19 until one realizes that Johnson can
20 comply with the covenant in one day and
21 the term, "personal service" is a
22 covenant which -- the term "personal
23 services" does not encompass which can
24 be performed by the deed. We conclude
25 that compliance with a petition

WORLDCOM, INC.

1 agreement is not, "services performed",
2 but were released from the performance
3 of service not just the performance of
4 service.

5 Second, the case law specifically
6 states that the benefits of the estate
7 cannot be potential or speculative.
8 "HSG"'s assertion here has to be that
9 they provided a benefit by not
10 soliciting because if they did solicit,
11 it could have taken away the customers.
12 With all due respect, I think Mr.
13 Engelman's opening argument got it wrong
14 with respect to the evidence. The
15 evidence is, in fact, that as Mr. Ahern
16 stated, they left off a portion of the
17 customers of Worldcom, that is, their
18 customers, during a period during which
19 "HSG" was soliciting what Mr. Ahern
20 would consider normal and there is error
21 in there.

22 And he didn't see anything outside
23 of the norm there. The presumption that
24 by not soliciting that they benefitted
25 the estate simply is flawed. Now, I

WORLDCOM, INC.

1 think the most important point with
2 respect to this solicitation, Your
3 Honor, is even after the fact that this
4 is not a transaction of the Debtor in
5 possession, "HSG" was not providing
6 services that it's speculative and the
7 presumption question is that "HSG"
8 actually solicited the customers. "HSG"
9 breached this provision and admitted in
10 their papers and Mr. Bein admitted in
11 his testimony, that is to say, Mr. Bein
12 admitted to soliciting or "HSG" was
13 still receiving commission payment.

14 "HSG" Exhibit 15, as Your Honor
15 heard from Mr. Ahern, on his testimony
16 on the solicitation, "HSG" has started
17 soliciting and had solicited again and
18 again which cost the Debtors thousands
19 of dollars and [inaudible] time and
20 effort, in counteracting that
21 solicitation. "HSG" simply cannot be
22 entitled to payment of administrative
23 claim for complying with a non-
24 solicitation provision when they were
25 actively soliciting and in fact, costing

WORLDCOM, INC.

1 the Debtors thousands of dollars, to
2 counteract. Again, Your Honor, I think
3 it's clear the non-solicitation
4 provision was a pre-petition agreement,
5 that every benefit under the restrictive
6 covenant was speculative at best and
7 what "HSG" -- that they didn't actually
8 comply with the non-solicitation
9 agreement.

10 The final are three priorities and
11 the priority afforded to creditors to
12 transact business with the Debtor in
13 possession. "HSG" was transacting
14 business with Worldcom and, in fact,
15 "HSG" terminated the contract so they
16 would no longer have to transact
17 business with Worldcom. As I stated,
18 the [inaudible] because of the
19 exclusivity provision, they wanted to,
20 in fact, and did begin transacting
21 business with a competitor of Worldcom,
22 Paranet Global.

23 I brought it upon on cross
24 examination and Mr. Bein admitted
25 sending letters to 14,000 other agents

WORLDCOM, INC.

1 announcing that and trying to get the
2 other agents to leave Worldcom and
3 Worldcom's customers with them. On
4 redirect examination and in fact on
5 cross examination of Mr. Ahern, Mr.
6 Engelman continued to ask about the
7 representation commission agreement
8 which prohibited the solicitation of
9 other agents because if it were not
10 prohibited in the agreement, it was
11 somehow okay.

12 Your Honor, "HSG" is missing the
13 point. What this demonstrates is that
14 "HSG" was doing everything it could to
15 smear Worldcom's reputation and to -- on
16 the estate, when they were soliciting
17 the customers, and they were soliciting
18 agents and they were telling Worldcom's
19 customers that Worldcom was bankrupt and
20 its service levels were declining and
21 that we're not even sure if Worldcom
22 will be around much longer. And now
23 they turn around and they want to be
24 compensated for that.

25 That is not a benefit to the

WORLDCOM, INC.

1 estate. Let me just break down the
2 provisions into three buckets. I think
3 that Mr. Engelman started but I think I
4 can do it better. The first bucket
5 begins on or about December 15th when
6 "HSG" claimed that it continued the call
7 center services and goes out into
8 perpetuity. There is simply no basis
9 upon which to pay these amounts.

10 "HSG" has not even asserted that
11 it's endeavoring to provide any
12 services. Payment, in fact, contradicts
13 the very nature of the Bankruptcy Code
14 and posts the discharge and I think that
15 Mr. Engelman had retreated from the
16 payment out in perpetuity and that he
17 came back to payment through November
18 15th. Even in his closing argument that
19 is. Now, the second bucket is, the
20 commissions for the months of October,
21 November and December or through
22 December the 15th and these are the
23 commissions aim to be paid post-
24 petition, prior to when "HSG" claimed
25 giving services and "HSG" is only

WORLDWIDE, INC.

1 entitled to payment of these commissions
2 to the extent that they met their burden
3 of -- or that they demonstrated to the
4 estate some benefit and this has fallen
5 well short of that. Third bucket and
6 this is raised by a counterclaim in our
7 objections, the commissions that were
8 paid for the period of July 22nd through
9 July 31st and the month of August and
10 September. Non-post petition commission
11 paid. Based on the Bankruptcy Code and
12 the provides that Debtors may not pay
13 petitioner's claims except in the
14 Bankruptcy Code by order of the Court.

15 And there is no order allowing
16 these payments and because Debtor had
17 demonstrated that "HSG" was not
18 providing a benefit to the estate, which
19 is a burden that was actually on "HSG"
20 to show they had been -- and there is
21 nothing in the Bankruptcy Code that
22 authorizes the Debtors to pay the July,
23 August and September commissions and
24 therefore, payment of those commissions
25 must be awarded and returned to the

WORLDCCM, INC.

1 Debtor.

2 There was one motion, Your Honor,
3 very quickly, last point. In Mr.
4 Ahern's cross examination of why the
5 letters didn't reference the
6 solicitations, and why did they continue
7 to pay after those solicitations were
8 made or occurred and, Your Honor, it was
9 a business judgment whether they acted
10 correctly in not terminating the
11 contract or taking some other avenue,
12 which is not an issue. But what is at
13 issue is whether "HSG" has provided any
14 benefit to the estate and we wish to
15 submit that "HSG" has not done so.

16 If Your Honor has any questions,
17 that's fine. Otherwise, I'm finished.

18 THE COURT: No. Does the
19 Committee wish to make a statement on
20 behalf of the Committee?

21 MR. DAVIS: Just a short statement
22 on behalf of the Committee. The
23 Committee does not have first hand
24 knowledge of the facts in this case, but
25 it does appear clear from the evidence

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1 of the record, first that this motion
2 involved pre-petition transactions and
3 secondly there is no benefit to the
4 estate as a result of "ATN"'s actions,
5 post-petition. Not only that from the
6 record before the Court it appears that
7 "HSG" also affirmatively violated
8 restrictive covenants and simply has not
9 provided any benefit to the estate
10 whatsoever. That is under Paragraph 3
11 and beyond that, I think it's important
12 that -- or for the Committee to
13 emphasize that allowing "HSG"
14 administrative treatment in this case
15 would create a very dangerous precedent.
16 And in that event, will put
17 administrative claim, if they were
18 awarded, administrative protection here.
19 I think it's quite possible, if not
20 likely, that similar agents would claim
21 similar protection thus creating
22 increasing administrative claims to the
23 Debtor's estate. Thank you, Your Honor.

24 THE COURT: Anything further from
25 Movant's?

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1 MR. ENGELMAN: Just a couple of
2 comments, Your Honor. I will be brief.
3 Your Honor, just two points that I would
4 just like to close with for you to
5 consider this. One is the argument that
6 everything was entered into between pre-
7 petition Debtor and nothing post-
8 petition that there were administrative
9 services provided by my client and post-
10 petition there were no services. Again,
11 I want to emphasize to the Court that
12 among other things, the August 6th
13 letter which is post-petition and it
14 does state that affirmatively it comes
15 from this Debtor that my client has the
16 obligation to restrain from soliciting
17 any customers. Paragraph 3 talks about
18 preserving the estate and I don't know
19 what can be more in line with the
20 concept of preserving the estate than
21 keeping the customer -- and to help keep
22 the customer base for this particular
23 Debtor.

24 And that was something obviously
25 important to this Debtor or else they

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1 wouldn't have put that in this letter of
2 accepting the termination. And it
3 doesn't mention anything about prior
4 solicitation but simply advises that
5 particular provision. So, I really, I
6 think we need to emphasize that.

7 The other thing that Mr. Marcus
8 talked about was that the post-petition
9 maintenance calls didn't provide any
10 benefit and I would liken this condition
11 to the insurance agent for New York Life
12 who procures customers for New York Life
13 and than has renewals on their insurance
14 policies come up and those policies
15 aren't going to be renewed and the
16 customers are not going to retain that
17 policy with New York Life unless the
18 agent gives him follow up service.

19 And that's what we're talking about
20 here, the follow up service that was
21 clearly a benefit and which benefitted
22 the estate and accepted by this Debtor
23 when they accepted the information via
24 the computer and via the phone.

25 I will close with one of the

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1 elements for determining, Your Honor,
2 whether to aware administrative expense.
3 And the issue is not so much what will
4 happen in the future with other agents
5 but what are the facts of this case.
6 And that is, one of the focuses and you
7 may take a look at whether or not you
8 need to award an administrative claim to
9 prevent unjust enrichment.

10 That is exactly what we're asking
11 the Court to take a look at here,
12 because what you have is Worldcom
13 wanting my client not to solicit and
14 wanting my client to continue to provide
15 services but it may not have been the
16 most important, but clearly, it didn't
17 stop them from doing that. And my
18 client was not soliciting the customer
19 base and at the same time, they were not
20 paying them and then after they
21 solicited and then after they didn't pay
22 them, they still wanted or threatened
23 them to bring an action for violating
24 the automatic stay.

25 Your Honor, I submit we're entitled

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1 to our administrative relief as
2 suggested so that we don't have to incur
3 this and so that the Debtor doesn't get
4 this unjust enrichment and I would add
5 on one final thing that I will close,
6 Your Honor, with this. We're at the
7 very last and second attempt asking
8 about the repayment on the post-petition
9 payments from my client. And I would
10 refer the Court to Paragraph No. 20 of
11 the admitted statement of fact that
12 says, "HSG" is only a representative
13 agent that Worldcom has [inaudible]
14 payment of commissions after the filing
15 date".

16 This, Your Honor, I would submit is
17 in line with the approach of Worldcom to
18 my client and that is, let's take
19 punitive action against them. Let's
20 benefit from them and tell them not to
21 solicit. But let's not pay them. Thank
22 you very much, Your Honor.

23 THE COURT: I'll order a
24 transcript and render a decision. Thank
25 you.

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1 [Whereupon, the hearing was
2 closed]

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C E R T I F I C A T I O N

I, EVELYN SALAS, certify that the foregoing transcript of proceedings in the matter of Worldcom, Inc., Case No. 02-13533 (AJG), was prepared using standard electronic transcription equipment and is a true and accurate record of the proceedings.

Signature Evelyn Salas

Date: July 21, 2003

Reported by Bob Sokol, #XI00372